In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 738

LOUIS W. NATHAN, GAETANO ALVITI, FRANK C. TORNABENE, PATRICK J. KNIGHT, AND JOSEPH A. GIBALAMO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a–14a) is reported at 238 F. 2d 401.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1956 (Pet. 1a). A petition for a rehearing was denied on January 3, 1957 (Pet. 16a). The petition for a writ of certiorari was filed on February 1, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, on a charge of conspiracy under 18 U. S. C. 241 to deprive citizens of a federally-secured right

to have their votes at a federal election given full weight and effect as cast, the court erred in charging, in effect, that petitioners were guilty if they intended to cast false votes.

STATUTE INVOLVED

18 U. S. C. 241 provides:

> *Conspiracy against rights of citizens*
>
> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
>
> They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

STATEMENT

An indictment returned in the United States District Court for the Northern District of Illinois charged petitioners and six others,[1] with a conspiracy, in violation of 18 U. S. C. 241, *supra*, to injure and oppress voters of a Chicago precinct in the exercise of rights secured to them by the Constitution—particularly the right to vote for the offices of United States Representative and Senator in a general elec-

[1] One of the six others named in the indictment was never apprehended; one entered a plea of guilty during the course of the trial; four were acquitted by the jury.

tion and to have such vote honestly counted and certified. After trial by jury, petitioners were found guilty (R. 3098–3102). Petitioner Nathan was sentenced to imprisonment for a term of 5 years and a fine of $4,000 plus costs, petitioner Alviti to a term of 4 years, 6 months and a fine of $2,500 and costs, and petitioners Tornabene, Knight, and Giralamo each to terms of 4 years, and fines of $200 and costs (R. 3154–3155).

Petitioners do not challenge the sufficiency of the evidence to show that in a federal election in 1954 they conspired to, and did, cast (and cause to be cast) false and fictitious ballots, either in the names of nonparticipating registered voters or in the names of nonregistered and fictitious voters. They challenge only the correctness of the charge given by the trial court.

At the conclusion of the evidence, counsel for the various parties submitted some 160 requests for instructions (R. 3059, 3064). The court, finding many of these duplicitous (R. 2467), held a lengthy hearing on the requests (R. 2703–2760), refusing some because the substance of the law was stated in a similar instruction to be granted [2] (R. 2763). Decision was reserved with respect to varying requests [3] purporting to be based upon the decision of *Screws v. United States*, 325 U. S. 91 (R. 2765).

The court, in its charge, instructed as to the presumption of innocence, and, at length and repeatedly,

[2] Steinberg and Salvatori Instruction No. 17 (Pet. App. 15a), the rejection of which is presently claimed as error by petitioners, was among this group.

[3] See Steinberg and Salvatori Instruction No. 16 (Pet. App. 15a).

as to the requirement and meaning of a finding of guilt beyond a reasonable doubt (R. 3024–3026, 3032, 3037, 3039, 3041, 3047, 3048, 3050). After setting forth the allegations of the indictment and discussing the law under which the indictment was drawn, the court charged that if the jury found that petitioners, or any of them, conspired to cast false votes for a federal candidate in the general election, and that lawful votes were cast for another in opposition to that candidate, then the jury must find that the petitioners so conspiring did conspire to injure citizens in the enjoyment of their civil rights (Appendix, *infra*, pp. 9–12, R. 3037). It instructed that fraudulent votes diluted legal votes and that the jury must be persuaded beyond a reasonable doubt that petitioners conspired to effect the voting and that the "* * * law requires only that you find beyond a reasonable doubt that the defendants conspired to deprive citizens of their rights to have their lawful votes given their full weight and effect as cast" (Appendix, *infra*, p. 10, R. 3037–3039). The court also instructed that petitioners' intent must be ascertained through circumstantial evidence (Appendix, *infra*, pp. 10–11, R. 3045 *et seq.*). In a supplemental charge, it instructed that the jury, to convict, must find beyond a reasonable doubt that petitioners or any two of them committed all of the material allegations in the indictment unlawfully, wilfully and knowingly (Appendix, *infra*, p. 13, R. 3091).

At the conclusion of the charge, defense counsel voiced objections to practically every element thereof (R. 3054–3090), including the refusal to charge that

specific intent to injure a citizen was essential, purportedly in conformance with the *Screws* decision, *supra* (R. 3062).

Upon appeal, the convictions were affirmed (Pet. App. 1a–14a).

ARGUMENT

1. Petitioners contend, as they did below, that the trial court committed reversible error in rejecting as part of its charge certain proffered instructions to the effect that the jury, in order to convict, must find that petitioners had the *specific* intent to injure or oppress citizens in the exercise of the federally-secured right of suffrage. They argue, in effect, that it was not enough for the jury to find that they intended to cast false votes, but that the jury should have been directed to find whether they also had in their minds the specific knowledge that, by casting the false votes, they would be depriving other voters of their full vote as guaranteed by the Constitution, as well as the specific intent to do just that.

Their argument is answered by the decision in *Screws* v. *United States*, 325 U. S. 91. There, in comparing the type of due process right under the Fourteenth Amendment involved in the case before it with the right to vote involved in *United States* v. *Classic*, 313 U. S. 299, it was said (at p. 106):

> The indictment [in *Classic*] was sufficient since it charged a willful failure and refusal of the defendant election officials to count the votes cast, by their alteration of the ballots and by their false certification of the number of votes cast for the respective candidates. * * * The

> right so to vote is guaranteed by Art. I, § 2 and § 4 of the Constitution. Such a charge is adequate since he who alters ballots or without legal justification destroys them would be acting willfully in the sense in which § 20 uses the term. The fact that the defendants may not have been thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution. When they so act they at least act in reckless disregard of constitutional prohibitions or guarantees.

Obviously, petitioners here knew that each vote was entitled to be counted in full. It is equally obvious that when they stuffed the ballot boxes they knew, and intended, that each valid vote would be counted at less than its full value. That was inescapably the immediate purpose of their ballot stuffing. The intention to stuff the boxes necessarily included, therefore, the intention to deprive each valid voter of his right to vote guaranteed by the Constitution. See also *United States* v. *Mosley*, 238 U. S. 383; *United States* v. *Classic*, 313 U. S. 299; *United States* v. *Saylor*, 322 U. S. 385.[4]

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[4] The pertinent difference between the election cases (like *Classic* and the present case) and the other cases on which petitioner relies (*e. g.*, Pet. 9–12) is that, in the former, it is impossible knowingly to perform the physical acts with which the defendants were charged without necessarily intending to dilute the right of valid voters to their full ballot. In the latter cases, on the other hand, the same physical acts—*e. g.*, beating or killing—could be performed for personal, private, reasons and purposes having nothing to do with federal rights.

Petitioners also misapprehend the *Screws* ruling, when they suggest (Pet. 9–10) that *Screws* requires the defendant to have personal knowledge that he is invading a right which is protected by the Federal Constitution. In considering a charge under Section 20 of the Criminal Code (now 18 U. S. C. 242) of willfully depriving a person of a right secured by the due process clause of the Fourteenth Amendment, four Justices of the Court held that, to sustain the statute against attack for vagueness, it was necessary that the defendant have the intent to deprive the victim of a constitutional right "which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them" (325 U. S. at 104). And see *Williams* v. *United States*, 341 U. S. 97, 101, where the Court said:

> It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court. Hence when officers wring confessions from the accused by force and violence, they violate some of the most fundamental, basic and well-established constitutional rights which every citizen enjoys.

The right to have a vote counted in full is a known and clearly defined right guaranteed by the Constitution. *Screws* at 94–95, 106, *supra*. The court therefore properly charged that petitioner's intent to interfere with that right was an intent to interfere with a right guaranteed by the Constitution.

2. There is likewise no merit to petitioners' contention that their conviction must be reversed because of the trial court's use of the phrase "with a reason-

able degree of accuracy" in the portion of the charge devoted to intent. See the Appendix, *infra*, p. 11. The court had reference merely to the fact that intent must be ascertained through consideration of circumstantial evidence, as it is obviously impossible to prove directly a person's state of mind. The jury was told immediately thereafter, as it had been told previously and throughout the charge, that every essential element of the conspiracy must be proved beyond a reasonable doubt before conviction could be had.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

MARCH 1957.

APPENDIX

INSTRUCTIONS

The court's charge reads in relevant part:

* * * * *

If you find beyond a reasonable doubt that the defendants or any of them conspired, or any two of them conspired to cast false votes for a federal candidate in the November 2, 1954, general election in the 7th Precinct of the First Ward in the City of Chicago, and if you find that lawful votes were cast for a federal candidate opposed to the candidate in whose favor the votes were conspired to be cast, then you must find that the defendants so conspiring did conspire to injure citizens in the enjoyment of their civil rights.

You are instructed, ladies and gentlemen of the jury, that votes legally cast for federal candidates of one party are lessened, diminished and diluted if false, fraudulent, illegal and fictitious votes are cast for federal candidates of another party and are counted, returned, certified and constitute a part of the total vote for federal candidates in the election in question, since the total vote for federal candidates is, to some extent, affected by these—by the said fictitious votes.

Now you must believe beyond a reasonable doubt from all the evidence that the defendants willfully conspired together for the purpose of and with the intent of casting fraudulent votes, or causing fictitious votes to be cast, and falsifying the count, all woth [with] respect to candidates for United States Representative and Senator in the election of November 2, 1954, and thereby depriving certain citizens of

the United States of their right to vote and to have their legal votes counted at full value, if you are to find any or all of these defendants guilty.

In other words, before you may find the defendants guilty you must be persuaded beyond a reasonable doubt that each of them knowingly entered into a conspiracy to affect the voting at this election by casting or causing to be cast false and fictitious votes; that citizens who were legally qualified voters would be deprived of their constitutional right to have their votes fully and fairly counted and returned.

If, on the other hand, from a consideration of all the evidence you are not convinced beyond a reasonable doubt that the defendants or any of them knowingly conspired with the intent and for the purposes which I have just described, then you must acquit those defendants or any one of them about whom you have such doubt.

The law under which the charge in this indictment was brought requires only that you find beyond a reasonable doubt that the defendants conspired to deprive citizens of their rights to have their lawful votes given their full weight and effect as cast. [R. 3037–3039.]

* * * * *

Ladies and gentlemen of the jury, a necessary element of the offense is the intent to accomplish the purpose of the conspiracy as charged in the indictment. Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eyewitness account of the state of mind with which the acts were done or omitted, but what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

In determining the issue as to intent, you are entitled to consider any statement made and acts done or omitted by each of the accused, and all facts and circumstances in evidence which may aid the determination of the state of mind. It is obviously impossible to ascertain or prove directly what were the operations of the minds of the defendants. You cannot look into a person's mind and see what his intentions are or were, but a careful and intelligent consideration of the facts and circumstances shown by the evidence in any case enables us to infer with a reasonable degree of accuracy what another's intentions were in doing or not doing certain things.

With a knowledge of definite acts, we may draw definite logical conclusions.

We are, in our affairs, continuously called upon to decide from the acts of others, what their intentions or purposes are, and experience has taught us that frequently actions speak more clearly than spoken or printed words.

You must, therefore, rely in part on circumstantial evidence in determining the guilt or innocence of any or all of the defendants.

Now before any one of the defendants can be bound by the acts or declarations of the other persons done in pursuance of the alleged conspiracy and out of his presence, the evidence must show beyond a reasonable doubt that there was such a conspiracy in existence to accomplish the alleged illegal common objects; that such defendants knew of the conspiracy and its common objects and purposes; that having such knowledge he accepted their implications and joined with the others in the attainment of the alleged objects of the conspiracy.

If you find from the evidence that the Government has failed to prove beyond a reasonable doubt any one of the foregoing elements with respect to any one defendant, then the acts

and declarations of any other alleged fellow conspirator may not be considered by you in determining the guilt or innocence of such defendant.

The essence of a crime of conspiracy is the alleged agreement and the intent, unlawful acts of individual intents; unlawful acts of individuals cannot be called a conspiracy unless it appears from the evidence beyond a reasonable doubt that the minds of the persons committing any alleged acts have previously made and agreed upon a common purpose contemplating something unlawful, either as a final object of the agreement or as a means of accomplishing it.

Therefore, even if you believe from the evidence that unlawful acts were committed by any of the alleged parties to the conspiracy, unless it is proven beyond a reasonable doubt that such alleged acts were committed as a result of prior agreement, and also unless it is further proved beyond a reasonable doubt that any defendant or the defendants was or were knowing participants in the alleged prior agreement, it is your duty to acquit that or those defendants.

Before any defendant can be found guilty under this indictment, it is incumbent upon the government to prove every material allegation therein beyond a reasonable doubt. Nothing is to be presumed or taken by implication against the defendants or any of them.

The law, as I have said before, presumes them innocent until they are proven guilty by competent evidence, and if the evidence in this case leaves in your minds any reasonable doubt of the guilt of any defendant, or if the government has failed to prove any material allegation of the indictment, the law makes it your duty to acquit such defendants. [R. 3045–3048]

* * * * *

SUPPLEMENTAL INSTRUCTIONS

Before the retirement of the jury, the following took place (R. 3091):

> [The Court] * * * On looking at the indictment, you will see that it charges that "The defendants named did unlawfully, willfully and knowingly conspire together," and I supplement my charge made earlier to say this:
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> That in considering whether or not the defendants or any of them have been found—rather, in considering whether or not they are guilty or not, or guilty beyond a reasonable doubt, you must find that as to all of the allegations, essential in character, material allegations in the indictment, that the defendants or any one of them did these acts, if you find they did them, committed them, beyond a reasonable doubt, unlawfully, willfully and knowingly.
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> Mr. Rieger [Government counsel]: Your Honor, I think you said "or any one of them."
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> The Court: Any two of them I meant to say, any two of them. Thank you very much.

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